No. 16301

United States Court of Appeals
For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

— and —

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture,
Respondents.

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS BOARD TO ENFORCE SAID ORDER AGAINST THE KINGS RIVER CONSTRUCTORS

REPLY BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

ALLEN, DEGARMO & LEEDY
By GERALD DEGARMO
SETH W. MORRISON
Attorneys for Kings River Constructors, Petitioners
1308 Northern Life Building,
Seattle 1, Washington

THE ARGUS PRESS, SEATTLE

No. 16301

United States Court of Appeals
For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

— and —

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture,
Respondents.

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS BOARD TO ENFORCE SAID ORDER AGAINST THE KINGS RIVER CONSTRUCTORS

REPLY BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

ALLEN, DEGARMO & LEEDY
By GERALD DEGARMO
SETH W. MORRISON
Attorneys for Kings River Constructors, Petitioners
1308 Northern Life Building,
Seattle 1, Washington

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

STATUTES

United States Court of Appeals
For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture, *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.* and NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture, *Respondents.*	No. 16301

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS BOARD TO ENFORCE SAID ORDER AGAINST THE KINGS RIVER CONSTRUCTORS

REPLY BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

I.

SCOPE OF REVIEW

The Brief of the National Labor Relations Board filed in this cause purports to support the Order of the Board appealed from on the sole basis that the only

issue involved is credibility of the witnesses, which it contends places the resolution of the case exclusively within its own determination. By its contention that all that is involved in considering whether the record in this case supports the Order is determining credibility, the Board seeks to place a blanket of immunity from judicial review on any case in which there is any portion of the testimony which, by ignoring the remainder, could arguably support the result, notwithstanding a direct conflict between such testimony and other testimony which must from its very nature be accepted.

These petitioners are just as familiar with the doctrine limiting judicial review of findings where the issue involved is *mere credibility* as the Board. We further recognize that to defeat judicial review, it is the standard defense to contend that only issues of *mere credibility* are involved, and to parrot the always quoted phrase (appearing on page 15 of the Board's Brief), "that the Trial Examiner, who saw and heard the witnesses and lived with the case, is in the best position to resolve credibility issues,".

However, the real issue in this case is whether Board findings can be sustained which are irreconcilably in conflict with facts established by the record beyond question. These facts have simply been ignored in the decision of the Trial Examiner, the Board, and now the Brief on behalf of the Board to this court. In their place, certain conclusions as to what must have happened have been substituted, which conclusions are not only based on pure speculation, but which are incon-

sistent with that which the evidence establishes did happen.

This case presents the classic situation to which the change in the scope of judicial review contained in the Taft-Hartley Act and fully discussed in the landmark case of *Universal Camera Corporation v. National Labor Relations Board* (1950) 340 U.S. 474, 95 L.Ed. 456, is applicable.

The Board argues in its brief that because some portions of the record may be referred to as supporting the Board findings, they have met the test of substantiality, notwithstanding that these portions of the record give support only "when viewed in isolation." *Universal Camera Corp.* case, *supra,* page 478 of U. S.

This was exactly the scope of review rule, involving judicial abdication as applied by some courts, which brought about the remedial action of Congress in enacting the review provisions of the Administrative Procedure Act, 5 U.S.C. 1009 (e) and the Taft-Hartley Act. This history is thoroughly discussed in pages 477 to 487 of 340 U.S., *Universal Camera Corporation v. N.R.L.B.,* which case, considering the frequency of its citation, is undoubtedly of almost memorized familiarity to the above court.

We urge it again only because the Board feels content to support its decision merely by calling upon the protective cloak of "credibility," and ignoring the actual conflict and inconsistency between the established facts and the Board decision. If the Trial Examiner and the Board can refuse to credit that which

must be credited, that which occurred beyond all doubt, and that which cannot be otherwise rationalized with the theory of decision, then there is no meaning to the phrase "on the record considered as a whole" or in the *Universal Camera* case.

There is of course meaning to the statutory standard and the meaning is that in establishing facts, there is considerable discretion vested in the Board, in selecting between conflicting testimony of at least equal weight and probability, but the Board does not have discretion to find against the substantial weight of evidence, even though there be some evidence pointing in the other direction, nor does the Board have discretion to simply ignore that which cannot be otherwise explained.

II.

EXCEPTIONS TO COUNTERSTATEMENT OF FACT BY THE BOARD

Although the Board has not set forth on what basis the statement of fact by petitioner is in error, it has nevertheless made a counterstatement of fact which is entirely in conflict on material findings, to-wit: (Page references are to Board Brief)

1. The Board continues to insist on page 6 that:

> "Prior to that day, Sharp had recommended Tuttle to Atkins for his job and Atkins had told Sharp to have Tuttle contact him (R. 14-15, 17; 186, 208, 211, 213-214). Atkins also had specifically requested his immediate superior, Officer Manager Weatherman, to secure Tuttle for the job (R. 15, 17, 19; 190-192, 151, 163, 209-214)."

This statement is made without in any manner at-

tempting to rationalize Mr. Sharp's testimony that the Monday of Mr. Tuttle's arrival on the job-site was also the first date that Sharp told Atkins of Tuttle's availability, as set forth in page 145 of the transcript and pages 16 through 18 of petitioner's brief, and it was only through Sharp that Atkins learned of Tuttle's availability (Tr. 186).

2. On page 6, the Board contends "during the interview Tuttle informed Wolcott that he was having trouble getting union clearance (R. 16; 227-228, 234)." The interview referred to occurred on Monday, the 25th, yet the reference to the record refers to a second interview on Tuesday, the 26th. It was at the second interview one day later that Tuttle first advised Wolcott of having difficulty with the union business agent.

3. On page 6:

> "Sometime after the Wolcott-Tuttle interview Jack DeLay, project manager at Black Rock, asked Wolcott to 'get him a good warehouseman' (R. 16, 20; 274-275)."

Neither the testimony on the pages referred to nor any other testimony establishes that the request by the project manager was made after the Wolcott-Tuttle interview. What does appear from those pages is that Myers was actually hired on February 28, three days after Tuttle first approached Wolcott. These distinctions are important, as will be hereinafter discussed.

4. On page 8:

> "Atkins informed Tuttle that he had put in a 'requisition' initially for Tuttle by name before the hiring of Myers, and indicated that Tuttle had

> not gotten the Black Rock job, because of Fudge's refusal to clear him (R. 17; 82-83, 119, 131-133, 149, 151, 161-162, 208-214, 288). He told Tuttle, 'I called you by name and Al Fudge said that you wasn't available for any job on this, on any of these jobs up here' (R. 82). He also advised Tuttle 'to go down and talk to (Fudge) real nice and see if you can't get him to clear you' (R. 17; 288-289)."

There is testimony that Atkins at some time attempted to hire Tuttle, but the testimony does not establish that it occurred prior to the hiring of Myers.

Transcript 82 and 83 involve a conversation which occurred around March 6 or 7 (Tr. 81), and which was the time of hiring of Ryan and not Myers.

Transcript 119 confirms that Mr. Atkins talked to Mr. Tuttle about Fudge at a later date.

Transcript 131-133 is Tuttle's version of the conference on March 6 or later.

Transcript 149 is Maples' version of the Tuttle-Atkins conference concerning Fudge, although Maples places the date on about March 15.

Transcript 151 again places the date of the Atkins-Tuttle discussion around March 15, which was the time of hiring Ryan.

Transcript 162 is a conclusion of Maples' and not testimony of what was said.

Transcript 208-14 contains Mr. Atkins' testimony on page 209 that he requested Mr. Tuttle around the 19th or 20th of February, although he in fact did not learn of his availability until the 25th. Atkins' testimony is adopted over the testimony of Sharp and Tuttle on this

issue only because it fits into the Board's theory and is necessary to sustain its decision.

Transcript 288 is again Tuttle's version of a conversation which occurred on or about March 15.

III.

REPLY TO BOARD ARGUMENT

1. On page 10, the Board recognizes that it is not clear which of several reasons as speculated upon in the argument was the cause of difficulty between Fudge and Tuttle. The petitioners can as easily speculate on reasons which would be entirely lawful, including the fact that Fudge had already committed the job to Myers. The Board has the burden of proof in these matters, and under familiar rule, their failure to call Fudge can only be interpreted as indicating that his testimony would have been adverse to the Board's contention. He had already settled his case with the Board, and presumably would have been a witness without motive or interest.

2. On page 10, the Board states that Petitioners do not dispute that if their *refusal* to hire Tuttle was because of his lack of union clearance, their conducted violated the Act. We do not dispute that refusal to hire a person because of lack of union clearance violates the Act, but we vigorously dispute that the Petitioners in fact refused to hire Tuttle at any time. They failed to hire him at a time when he apparently became involved in a dispute with the union business agent, and the Board is attempting to connect this dispute with the failure to hire.

3. On page 11, the Board continues to contend and argue that the request was made for Tuttle "prior to the time when Tuttle on February 25 interviewed the union's business agent and incurred his displeasure." Again this argument is made notwithstanding conclusive testimony that Atkins did not even know Tuttle was available or existed until Sharp arrived on the job on Monday, and told Atkins about Tuttle, at which time Atkins immediately advised that the job was committed.

a. In attempting to dispose of this conflict, on page 14 the Board's Brief states: "In any event, the exact time when Atkins first learned of Tuttle's availability assumes significance only in its relationship to the sequence of events" . . . Petitioners are at a loss to understand what is meant by this phrase in view of the fact that the "sequence of events" is the crux of the case. Knowledge of Tuttle's availability and a request for his hire prior to Monday, February 25 forms the entire basis of the Trial Examiner's decision, including his conclusions that Wolcott and Atkins were lying.

b. The Board attempts to avoid the impact of this irreconcilable conflict by suggesting that "the telephone, a logical means of communication, was available at the project (R. 75-76, 132, 163, 230)." There is of course no evidence whatsoever of any telephone calls between any parties during this week-end concerning Tuttle. The situation in this case is identical to that contained in a case of *N.L.R.B. v. Amalgamated Meat Cutters,* CA 9, 1953 (202 F.2d 671), from which the following is quoted at page 673:

> "Notwithstanding this want of anything but hearsay to support this particular portion of the

> complaint against the Union, the trial examiner arrived at his conclusion by saying: 'However, the circumstances set forth in the evidence establish in the case of E. A. Wyatt, Gearhart *must have been told* by the Union that the Union objected to the continuation of Wyatt's employment.' (Emphasis added.) The Board is not permitted to arrive at conclusions based on such speculations."

We might paraphrase the Board by saying that somebody "must have telephoned," yet there is no basis for even inferring that such a call was made. Tuttle would not have called Atkins because he did not know him. Sharp did not call him because he testified that he did not mention Tuttle to Atkins until he arrived on the job on Monday morning, February 25 (Tr. 145). Wolcott would not have called because he did not know Tuttle. Perkins did not testify of any call. He merely took Tuttle to the Kings River office in Fresno. Fudge did not call because he did not meet Tuttle until Monday, the 25th.

4. On page 12:

> "Wolcott conceded that it was *subsequent to* his interview with Tuttle that the Black Rock project manager asked Wolcott to get him a good warehouse clerk." (Tr. 274-275).

In this testimony, under interrogation by the Trial Examiner, Wolcott states that the arrangements to hire Myers were made after the initial Tuttle interview. But it is apparent that the arrangements referred to were arrangements of the actual hiring, which occurred on February 28. The original arrangements of calling the union to supply a person were obviously made in advance of this time. Mr. Sharp testified that Perkins advised Atkins that Sharp would be transferred out,

and this advice occurred on Friday, February 22. The conclusion that the request by Mr. DeLay to obtain a good warehouseman occurred subsequent to Monday, February 25, leaves without explanation the established fact that the job was committed on Monday morning when Atkins first learned of Tuttle from Sharp.

5. Pages 13 and 14 purport to establish the probability of Tuttle's hire by referring to Atkins' request. It appears from the record that Atkins made such a request while waiting for word on the availability of Mr. Ryan in the middle of March, as suggested by Mr. Atkins' testimony as follows (Tr. 193):

> "A. I believe in the case of Mr. Ryan I contacted the district office, Mr. Marv Muller.
>
> Q. You contacted them direct?
>
> A. That is right. And I asked if Mr. Ryan was available, that I would like to procure him. And at that time I was informed that he was not available.
>
> Q. I see. And then what was your procedure?
>
> A. Then I put a request in for a man and about four hours later I received a call from Los Angeles, from Mr. Muller, that Mr. Ryan would be available. And I asked to have him come in."

This is the only occasion under the evidence when such a request would have been made. There were only three jobs, the one filled on February 25 when Tuttle first arrived, the one Ryan filled which Tuttle might have otherwise gotten, had Ryan not been available, and the one actually offered to Tuttle in April.

It appears that whatever difficulty Tuttle had with

Fudge was later a subject of general conversation, and Fudge's conduct in attempting to interfere with Tuttle's obtaining employment certainly amounts to an unfair labor practice, for which we are advised Local 431 has complied by a settled charge. If there was evidence of a refusal by petitioners to hire Tuttle because of failure to get a clearance, petitioners might also have committed an unfair labor practice. However, the evidence is only of a failure to hire Tuttle under circumstances which are consistent with the unavailability of a job and are inconsistent with discriminatory refusal to hire.

In Conclusion, we are not asking this court to accept one of two equally possible versions of the evidence in this case. We are asking it to determine that the version of events adopted by the Board cannot be sustained when the entire record is considered.

Respectfully submitted,

Allen, DeGarmo & Leedy
By Gerald DeGarmo
Seth W. Morrison

July 1, 1959

1308 Northern Life Tower
Seattle 1, Washington